Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-510

WISCONSIN DEPARTMENT
OF REVENUE,
*Petitioner,*

*v.*

MIDWESTERN GAS
TRANSMISSION COMPANY,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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## BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

## OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at *Midwestern Gas Transmission Co. v. Department of Revenue*, 84 Wis. 2d 261, 267 N.W. 2d 253 (1978) and appears in petitioner's appendix (1a-14a). The unreported opinion of the Circuit Court for Dane County is set forth in respondent's appendix (1b). The unreported judgment of the Circuit Court for Dane County and the opinion of the Wisconsin Tax Appeals Commission appear in the petitioner's appendix (13a-14a) and (15a-21a), respectively.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether the respondent's activity of transporting natural gas into Wisconsin through an interstate pipeline and consuming a portion of that gas in compressor stations in order to maintain the pressure necessary to sustain the movement of the gas in interstate commerce, without first storing or otherwise bringing the gas to rest within the State, lacks a substantial nexus with the State so that the Commerce Clause prohibits the imposition of the Wisconsin use tax on the amount of gas so consumed?

The Wisconsin Supreme Court held in the affirmative.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause, U.S. Const. art. I, §8, cl. 3:

> "The Congress shall have power ...
>
> ...
>
> "To regulate commerce with foreign nations, and among the several states..."

Section 77.53 (1), Wis. Stats. (1975):

> "An excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer on or after February 1, 1962, at the rate of 3% of the sales price of the property or taxable services; but beginning on September 1, 1969 the rate of the tax hereby imposed shall be 4%."



Section 77.51 (5), Wis. Stats. (1975):

> " 'Tangible personal property' means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water ...."

Section 77.51 (7), Wis. Stats. (1975):

> " 'Retailer' includes:
>
> "(a) Every seller who makes any sale of tangible personal property or taxable service."

Section 77.54 (1), Wis. Stats. (1975):

> "There are exempted from the taxes imposed by this subchapter:
>
> "(1) The gross receipts from the sale of and the storage, use or other consumption in this state of tangible personal property and services the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state."

## STATEMENT OF THE CASE

The respondent, Midwestern Gas Transmission Company (Midwestern) operates an interstate natural gas transmission pipeline which transports natural gas from the Manitoba-Minnesota border to a pipeline interconnection at Marshfield, Wisconsin. Although several of Midwestern's customers obtain gas for resale through various outlets along the pipeline, the bulk of the gas is sold to another

interstate pipeline company at Marshfield. (Petitioner's appendix at 1a, 15a-16a.)

The natural gas must be kept under pressure to propel it through the pipeline. Midwestern operates eight compressor stations along its pipeline to maintain the pipeline pressure; two of these stations are located in Wisconsin. At each station a small amount of gas is tapped from the pipeline, filtered, metered, reduced in pressure, and fed to engines to run the pipeline compressors. This gas is never stored or stopped; it flows continuously from the pipeline to consumption in the compressor engines. (Petitioner's appendix at 1a-2a, 16a-17a.)

In May, 1972, the petitioner, Wisconsin Department of Revenue, made an assessment of use tax against Midwestern for the natural gas consumed at its two Wisconsin compressor stations during the period of September 1, 1969, to December 31, 1971. The value of the gas so consumed was stipulated, and the tax was set at $11,972.86. (Petitioner's appendix at 2a, 18a.) Midwestern's petition for redetermination of the assessment was denied, and that denial was affirmed upon review by the Wisconsin Tax Appeals Commission, the Commission holding that imposition of the use tax did not violate the Commerce Clause. (Petitioner's appendix at 21a.)

Midwestern sought review of the Tax Appeals Commission decision in the Circuit Court for Dane County. That court reversed the order of the Commission upon the ground that imposition of the use tax would violate the Commerce Clause. (Respondent's appendix at 1b.) The Wisconsin Supreme Court affirmed the decision of the Circuit Court without dissent, holding that the respondent's activity of consuming gas in this



manner lacked a substantial nexus to the state and thereby was immune from state taxation by virtue of the Commerce Clause.

## ARGUMENT

*The Decision Below Is In Harmony With The Decision Of This Court.*

In holding that the Wisconsin Department of Revenue's attempted imposition of the State's use tax in this case is invalid under the Commerce Clause, the Wisconsin Supreme Court correctly applied the multi-factored test most recently adopted by this Court in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977) and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Co.,* 98 S.Ct. 1388 (1978). Referring specifically to the *Complete Auto Transit* and *Washington Stevedoring* decisions, the Wisconsin court observed:

> "In these cases, the Court abandoned two tests which looked primarily to the language of the taxing statute in favor of an analysis of the economic consequence the tax would have on interstate commerce. The Court also indicated four criteria which a taxing statute must satisfy to be valid under this analysis: (1) The activity taxed must have a substantial nexus with the state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to services provided by the State."

*Midwestern Gas Transmission Co. v. Department of Revenue,* 84 Wis. 2d 261, 270, 267 N.W. 2d 253, 257-58 (1978) (Petitioner's appendix p. 11a).

Having noted the correct analysis to be applied to the case before it, the Court below went on to state at 84 Wis. 2d 270, 267 N.W. 2d 258 (Petitioner's appendix p. 11a):

> "Under this analysis, the key question here is whether the activity the department seeks to tax has a substantial nexus with the State."

The determination reached by the Wisconsin court was that the activity sought to be taxed by that State's taxing authority lacked a substantial nexus with the State and, therefore, was immune from state taxation by reason of the Commerce Clause.

In reaching this determination, the Wisconsin Supreme Court gave full consideration not only to the principles adopted in *Complete Auto Transit* and *Washington Stevedoring*, but also to prior decisions of this Court relating specifically to the imposition of a state use tax upon an interstate activity. In particular, the state court relied upon this Court's decision in *Helson v. Kentucky*, 279 U.S. 245 (1929), as an example of a tax found invalid because imposed upon an interstate activity which lacked a substantial nexus with the taxing state. In *Helson*, this Court struck down as violative of the Commerce Clause a Kentucky tax on the use in Kentucky of gasoline purchased in Illinois to fuel an interstate ferry. It is the petitioner's claim, however, that the decision in *Helson* is no longer valid and that the Wisconsin court's decision in the present case should be reviewed and reversed because of its misplaced reliance upon that decision.

While the rationale employed to strike down the use tax in *Helson* as being too direct a burden on interstate commerce has now been supplanted by the multi-factored test of *Complete Auto Transit*



and *Washington Stevedoring*, the Wisconsin court's reliance on *Helson* in determining that the activity sought to be taxed lacked a substantial nexus with the State was not erroneous. The Wisconsin Supreme Court determined that the activity of consuming natural gas during the course of its interstate flow for the purpose of providing the motive force for that flow, was, under the circumstances of this case, an activity lacking a substantial nexus with the state.

Petitioner presents no compelling reasons why this determination by the Wisconsin Supreme Court should be disturbed. The incidence of the tax in this case was on the use of respondent's natural gas for the limited purpose of powering the flow of commerce, not on the sum of respondent's business activities within the state. Had the tax been levied on a substantial business activity as was taxed in *Complete Auto Transit* and *Washington Stevedoring*, a sufficient nexus clearly would have been present.

The principles salient to a test of a state tax for validity under the Commerce Clause have been elucidated in detail by this Court in several very recent decisions, including *Complete Auto Transit, supra, Washington Stevedoring, supra,* and *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), among others. Petitioner presents no compelling reason why this Court should undertake yet another review of this issue.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: October 17, 1978.

Respectfully submitted,

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## APPENDIX

STATE OF WISCONSIN
CIRCUIT COURT Br. 2
DANE COUNTY

MIDWESTERN GAS
TRANSMISSION CO.,
Petitioner,

vs.

WISCONSIN DEPARTMENT
OF REVENUE,
Respondent.

DECISION
Case No. 147-343

The court has reviewed the record herein and has concluded that the respondent is in error. This conclusion is based on *Helson v. Commonwealth of Kentucky* (1929), 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683. The Court of Appeals of Michigan, a similar fact situation, concluded that a state tax violated the Interstate Commerce Clause. *Michigan-Wisconsin Pipe Line Company v. State* (1975), 227 N.W. 2d 324, 58 Mich. App. 318. This court approves and adopts that opinion.

Accordingly, the court will reverse the decision and order of the respondent and abate the tax assessment as requested in the petition. Counsel for the petitioner may draft an appropriate order.

Dated this 1 day of June, 1976.

BY THE COURT:

*/s/ Michael B. Torphy, Jr.*
Hon. Michael B. Torphy, Jr.
Judge, Circuit Court, Br. 2